



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**CENTRAL REGISTRY**

**CIVIL CASE NO. 503 OF 2010**

1. SAMWEL CHACHA RIOBA.....PLAINTIFFS  
2. GEOFFREY OTEKO ONTIERI.....PLAINTIFFS
- V E R S U S**
1. HEADLINK PUBLISHERS LIMITED.....DEFENDANTS  
2. HARAMBEE SACCO SOCIETY LIMITED.....DEFENDANTS

**R U L I N G**

The Plaintiffs' suit filed by plaint dated 28<sup>th</sup> October, 2010 is for damages in defamation and related reliefs.

Together with the plaint the Plaintiffs filed chamber summons of the same date seeking temporary injunction pending disposal of the suit to restrain the Defendants from publishing or causing to be published words whose import or effect would be to defame the Plaintiffs. Upon that application an *ex parte interim injunction was granted on 29<sup>th</sup> October, 2010* pending disposal of the application.

The Plaintiffs have now come to court by **chamber summons dated 18<sup>th</sup> November, 2010** seeking an order that the directors of the 1<sup>st</sup> Defendant be cited for contempt of court and sentenced to prison for a term not exceeding 6 months and/or be fined.

The sum total of the grounds on the face of the application is that the directors of the 1<sup>st</sup> Defendant are in contempt of the aforesaid order of 29<sup>th</sup> October, 2010. The application is supported by the joint affidavit of the Plaintiffs.

To the supporting affidavit are annexed a number of documents. They include the formal order of 29<sup>th</sup> October, 2010 **together with a penal notice**, and an affidavit of service of the order and the penal notice. There is also a copy of a story published in the *Citizen Weekly* dated 15<sup>th</sup> November, 2010 whose publication the Plaintiffs allege was in contempt of the order of 29<sup>th</sup> October, 2010.

Neither the 1<sup>st</sup> Defendant nor any of its directors have filed any papers in response to the application despite due service.

For some reason the 2<sup>nd</sup> Defendant has filed a replying affidavit in response to the application, although clearly the application does not concern it.

The 2<sup>nd</sup> Defendant has taken up two points in opposing the application. The first point is that the supporting affidavit is incompetent on account of it being sworn jointly by the Plaintiffs contrary, in the opinion of counsel for the 2<sup>nd</sup> Defendant, to the old **Order XVIII, rule 5** of the **Civil Procedure Rules** (the **Rules**) which provides:

**“5. Every affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to a distinct portion of the subject.”**

With respect, I think learned counsel for the 2<sup>nd</sup> Defendant is labouring under a misapprehension of the English language. It appears that his understanding is that the **first person tense** must always be singular. However, there is **first person singular** and **first person plural**. **“I”** is first person singular. **“We”** is first person plural.

An affidavit sworn jointly by two or more persons which states –

**“We, so-and-so, hereby make oath and state as follows.....”**

is drawn in the first person plural. It is not drawn in the second or third person. **“You”** is second person. **“They”** is third person.

There is absolutely nothing wrong with the supporting affidavit jointly sworn as it is by the Plaintiffs. It is drawn in the first person (albeit plural) as required by rule 5 of Order XVIII.

The second point taken by the 2<sup>nd</sup> Defendant is that there is no evidence of proper service of the order of 29<sup>th</sup> October, 2010 and penal notice.

The affidavit of service annexed to paragraph 6 of the supporting affidavit which is sworn by the process server called Danson M. Mbote merely states in paragraphs 2 and 3 that on 15<sup>th</sup> November, 2010 he received copies of the order and penal notice with instructions to effect service thereon upon the 1<sup>st</sup> Defendant; and that on the same day he went to Town House, 3<sup>rd</sup> Floor where he served the 1<sup>st</sup> Defendant who refused to sign but retained copies of the order and penal notice.

A service of process upon which penal proceedings may be based ought to be clear and personal. The person receiving the process on behalf of a corporation ought to be properly identified by name and his position in the corporation.

It must be recalled that the application herein is directed at the directors of the 1<sup>st</sup> Defendant. So, those directors ought to have been properly identified and personally served with the order and penal notice. This was not done. Upon that ground of want of proper service alone, the application must fail.

There is also another issue. By the same affidavit of service mentioned above, the order and penal notice were served on 15<sup>th</sup> November, 2010. The time of service is not indicated.

Even if we were to assume that there was good service, the further publication alleged to have been in contempt of the order of 29<sup>th</sup> October, 2010 was dated 15<sup>th</sup> November, 2010, the very day of service. So, which came first, the publication of the service? Most likely it was the publication. Ordinarily,

newspapers and magazines will be available in the streets very early in the morning of the date of publication. So, it would appear that even if it were to be assumed that there was good service of the order and penal notice, the service must have been after the publication.

Having considered the written submissions filed on behalf of the Plaintiffs and the 2<sup>nd</sup> Defendant, including the cases cited, I find no merit in this application. It is hereby dismissed with costs to the 2<sup>nd</sup> Defendant. It is so ordered.

**DATED AT NAIROBI THIS 1<sup>ST</sup> DAY OF APRIL, 2011**

**H.P.G. WAWERU**

**JUDGE.**

**SIGNED AND DELIVERED THIS 8<sup>TH</sup> DAY OF APRIL, 2011**